

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION**

TERRELL LEE BARRETT,)
)
Plaintiff,)
)
v.) No. 2:19CV27 HEA
)
STATE OF MISSOURI, et al.,)
)
Defendants.)

OPINION, MEMORANDUM AND ORDER

This matter comes before the Court on the motion of plaintiff Terrell Lee Barrett for leave to commence this civil action without prepayment of the required filing fee. (Docket No. 2). Having reviewed the motion and the financial information submitted in support, the Court has determined that plaintiff lacks sufficient funds to pay the entire filing fee, and will assess an initial partial filing fee of \$23.02. *See* 28 U.S.C. § 1915(b)(1). Additionally, for the reasons discussed below, the Court will dismiss plaintiff's complaint without prejudice.

28 U.S.C. § 1915(b)(1)

Pursuant to 28 U.S.C. § 1915(b)(1), a prisoner bringing a civil action in forma pauperis is required to pay the full amount of the filing fee. If the prisoner has insufficient funds in his or her prison account to pay the entire fee, the Court must assess and, when funds exist, collect an initial partial filing fee of 20 percent of the greater of (1) the average monthly deposits in the prisoner's account, or (2) the average monthly balance in the prisoner's account for the prior six-month period. After payment of the initial partial filing fee, the prisoner is required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency having custody of the prisoner will forward these

monthly payments to the Clerk of the Court each time the amount in the prisoner's account exceeds \$10.00, until the filing fee is fully paid. *Id.*

In support of his motion to proceed in forma pauperis, plaintiff submitted a certified inmate account statement. (Docket No. 4). The statement shows an average monthly deposit of \$115.09. The Court will therefore assess an initial partial filing fee of \$23.02, which is 20 percent of plaintiff's average monthly deposit.

Legal Standard on Initial Review

Under 28 U.S.C. § 1915(e)(2), the Court is required to dismiss a complaint filed in forma pauperis if it is frivolous, malicious, or fails to state a claim upon which relief can be granted. To state a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate a plausible claim for relief, which is more than a "mere possibility of misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw upon judicial experience and common sense. *Id.* at 679. The court must "accept as true the facts alleged, but not legal conclusions or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Barton v. Taber*, 820 F.3d 958, 964 (8th Cir. 2016). *See also Brown v. Green Tree Servicing LLC*, 820 F.3d 371, 372-73 (8th Cir. 2016) (stating that court must accept factual allegations in complaint as true, but is not required to "accept as true any legal conclusion couched as a factual allegation").

When reviewing a pro se complaint under § 1915(e)(2), the Court must give it the benefit of a liberal construction. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). A "liberal construction"

means that if the essence of an allegation is discernible, the district court should construe the plaintiff's complaint in a way that permits his or her claim to be considered within the proper legal framework. *Solomon v. Petray*, 795 F.3d 777, 787 (8th Cir. 2015). However, even pro se complaints are required to allege facts which, if true, state a claim for relief as a matter of law. *Martin v. Aubuchon*, 623 F.2d 1282, 1286 (8th Cir. 1980). *See also Stone v. Harry*, 364 F.3d 912, 914-15 (8th Cir. 2004) (stating that federal courts are not required to "assume facts that are not alleged, just because an additional factual allegation would have formed a stronger complaint"). In addition, affording a pro se complaint the benefit of a liberal construction does not mean that procedural rules in ordinary civil litigation must be interpreted so as to excuse mistakes by those who proceed without counsel. *See McNeil v. United States*, 508 U.S. 106, 113 (1993).

The Complaint

Plaintiff is a pro se litigant who is currently incarcerated in the Boonville Correctional Center in Boonville, Missouri. He brings this action pursuant to 42 U.S.C. § 1983, naming the State of Missouri, the Missouri Department of Corrections, and Corizon Health Service as defendants.

Plaintiff states that while incarcerated in the Missouri Department of Corrections, at Moberly Correctional Center, Corizon Health Service "failed on several occasions to provide proper medical care to multiple injuries" he sustained while under their supervision. (Docket No. 1 at 5). Due to this "inadequate care," plaintiff was forced to undergo "several unsuccessful operations" to both his left knee and left hand.

Specifically, in 2013, plaintiff states that he had surgery to repair a torn left patellar ligament while at the Farmington Correctional Center. On September 25, 2015, while at the Moberly Correctional Center, he had surgery for a broken metacarpal bone. He suffered a

reoccurring injury to his knee on October 16, 2016, also while at the Moberly Correctional Center.

Plaintiff alleges that with regard to his reoccurring knee injury, “no treatment was ever given or done,” even though he asked medical staff multiple times. Similarly, he claims that “nothing was given or done” even when he notified medical staff about the “botched operation” on his hand.

Plaintiff seeks damages in the amount of \$5 million for present and future medical expenses, pain and suffering, and future lost wages. (Docket No. 1 at 6).

Discussion

Plaintiff brings this § 1983 action against defendants State of Missouri, Missouri Department of Corrections, and Corizon Health Service. For the reasons discussed below, plaintiff’s complaint must be dismissed.

A. Defendants State of Missouri and Missouri Department of Corrections

Plaintiff has failed to state a claim against the State of Missouri and the Missouri Department of Corrections because neither defendant is a “person” for purposes of § 1983.

“Section 1983 provides for an action against a ‘person’ for a violation, under color of law, of another’s civil rights.” *McLean v. Gordon*, 548 F.3d 613, 618 (8th Cir. 2008). *See also Deretich v. Office of Admin. Hearings*, 798 F.2d 1147, 1154 (8th Cir. 1986) (stating that “[§] 1983 provides a cause of action against persons only”). However, “neither a State nor its officials acting in their official capacity are ‘persons’ under § 1983.” *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989). *See also Calzone v. Hawley*, 866 F.3d 866, 872 (8th Cir. 2017) (stating that a “State is not a person under § 1983”); and *Kruger v. Nebraska*, 820 F.3d 295, 301 (8th Cir. 2016) (stating that “a state is not a person for purposes of a claim for money damages

under § 1983’’). Furthermore, an agency exercising state power is also not a person subject to suit under § 1983. *See Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 948 F.2d 1084, 1086 (8th Cir. 1991).

Here, plaintiff has named a state and a state department as defendants in a suit for money damages. As noted above, however, neither are “persons” for purposes of stating a claim under § 1983. Therefore, plaintiff’s claims against the State of Missouri and the Missouri Department of Corrections must be dismissed.

Moreover, both the State of Missouri and the Missouri Department of Corrections are entitled to sovereign immunity.

“Sovereign immunity is the privilege of the sovereign not to be sued without its consent.” *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). The Eleventh Amendment has been held to confer immunity on an un-consenting State from lawsuits brought in federal court by a State’s own citizens or the citizens of another State. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). *See also Webb v. City of Maplewood*, 889 F.3d 483, 485 (8th Cir. 2018) (“The Eleventh Amendment protects States and their arms and instrumentalities from suit in federal court”); *Dover Elevator Co. v. Ark. State Univ.*, 64 F.3d 442, 446 (8th Cir. 1995) (“The Eleventh Amendment bars private parties from suing a state in federal court”); and *Egerdahl v. Hibbing Cnty. Coll.*, 72 F.3d 615, 618-19 (8th Cir. 1995) (“Generally, in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment”).

There are two “well-established exceptions” to the sovereign immunity provided by the Eleventh Amendment. *Barnes v. State of Missouri*, 960 F.2d 63, 64 (8th Cir. 1992). “The first exception to Eleventh Amendment immunity is where Congress has statutorily abrogated such

immunity by clear and unmistakable language.” *Id.* However, The United States Supreme Court has determined that § 1983 does not revoke the States’ Eleventh Amendment immunity from suit in federal court. *See Will*, 491 U.S. at 66 (“We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent”); and *Quern v. Jordan*, 440 U.S. 332, 341 (1979) (“[W]e simply are unwilling to believe...that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States”).

The second exception is when a State waives its immunity to suit in federal court. *Barnes*, 960 F.2d at 65. A State will be found to have waived her immunity “only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.” *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 473 (1987).

Here, plaintiff is attempting to sue both a state and a state department. Such an action can only proceed if Congress has statutorily abrogated immunity or the state itself has waived it. As noted above, § 1983 does not revoke a state’s Eleventh Amendment protections. Furthermore, the state in this instance has not waived its immunity. *See Mo. Rev. Stat.* 537.600. Therefore, both the State of Missouri and the Missouri Department of Corrections are immune from plaintiff’s § 1983 action.

B. Defendant Corizon Health Service

Plaintiff has failed to state a claim against defendant Corizon Health Service. A corporation acting under color of state law cannot be liable on a respondeat superior theory.” *Smith v. Insley’s Inc.*, 499 F.3d 875, 880 (8th Cir. 2007). Rather, to support a claim against such a corporation, the plaintiff “must show that there was a policy, custom, or official action that

inflicted an actionable injury.” *Johnson v. Hamilton*, 452 F.3d 967, 973 (8th Cir. 2006). *See also Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972, 975 (8th Cir. 1993) (stating that a corporation acting under color of state law will only be held liable where “there is a policy, custom or action by those who represent official policy that inflicts injury actionable under § 1983”).

Here, plaintiff’s allegations give no indication that his rights were violated due to a Corizon policy, custom, or official action. Indeed, his allegations do not state any sort of claim whatsoever. His statement of claim relies almost entirely on unsupported conclusions and vague assertions regarding his medical treatment, leaving the Court to speculate as to what did or did not happen. The Court is not required to accept such pleadings as true. *See Torti v. Hoag*, 868 F.3d 666, 671 (8th Cir. 2017) (stating that courts “are not bound to accept as true a legal conclusion couched as a factual allegation, and factual allegations must be enough to raise a right to relief above the speculative level”). Therefore, plaintiff’s claim against Corizon Health Service must be dismissed.

C. Motion to Appoint Counsel

Plaintiff has filed a motion to appoint counsel. (Docket No. 3). The motion will be denied as moot as plaintiff’s action is being dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

Accordingly,

IT IS HEREBY ORDERED that plaintiff’s motion for leave to proceed in forma pauperis (Docket No. 2) is **GRANTED**.

IT IS FURTHER ORDERED that plaintiff must pay an initial partial filing fee of \$23.02 within **thirty (30)** days of the date of this order. Plaintiff is instructed to make his remittance payable to “Clerk, United States District Court,” and to include upon it: (1) his name;

(2) his prison registration number; (3) the case number; and (4) the statement that the remittance is for an original proceeding.

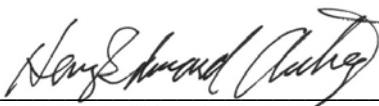
IT IS FURTHER ORDERED that plaintiff's motion for appointment of counsel (Docket No. 3) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that plaintiff's complaint is dismissed without prejudice.

See 28 U.S.C. § 1915(e)(2)(B). A separate order of dismissal will be entered herewith.

IT IS FURTHER ORDERED that an appeal from this dismissal would not be taken in good faith.

Dated this 29 July 2019.



HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE